

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JEROME FOSSELMAN,
CDCR #H-66012,

Plaintiff,

vs.

JAMES TILTON, Secretary, Cal. Dept. of
Corrections and Rehabilitation;
VICTOR M. ALMAGER, Warden;
CANDIE COOK, Medical Appeals
Coordinator; Dr. CUMMINGS, Dentist,

Defendants.

Civil No. 07-1676 IEG (WMc)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE, GARNISHING \$350
FROM PRISONER'S TRUST
ACCOUNT [Doc. No. 6]; AND**

**(2) DIRECTING U.S. MARSHAL
TO EFFECT SERVICE OF
SUMMONS AND COMPLAINT
PURSUANT TO Fed.R.Civ.P. 4(c)(2)
AND 28 U.S.C. § 1915(d)**

Jerome Fosselman ("Plaintiff"), a prisoner currently incarcerated at Centinela State Prison ("CEN") in Imperial, California, and proceeding pro se, has submitted a civil rights Complaint pursuant to 42 U.S.C. § 1983 alleging inadequate dental treatment in violation of the Eighth Amendment. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 6].¹

¹ The court denied Plaintiff's first Motion to Proceed IFP on October 30, 2007 [Doc. No. 4] because Plaintiff failed to attach a certified copy of his prison trust account statement for the 6-month period immediately preceding the filing of his Complaint as required by 28 U.S.C. § 1915(a)(2).

1 **I. Motion to Proceed IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the United
 3 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
 4 U.S.C. § 1914(a). An action may proceed despite a party's failure to pay only if the party is
 5 granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493
 6 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).
 7 Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee in
 8 installments, regardless of whether the action is ultimately dismissed for any reason. *See* 28
 9 U.S.C. § 1915(b)(1) & (2).

10 The Court finds that Plaintiff has now submitted an affidavit which complies with 28
 11 U.S.C. § 1915(a)(1), *and* has attached a certified copy of his trust account statement pursuant
 12 to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement shows
 13 an average monthly balance and average monthly deposits of zero in his trust account during the
 14 six-month period preceding the filing of his Complaint, and a negative available balance due to
 15 "legal copies holds." Therefore, the Court finds Plaintiff has insufficient funds from which to
 16 pay any initial filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a
 17 prisoner be prohibited from bringing a civil action or appealing a civil action or criminal
 18 judgment for the reason that the prisoner has no assets and no means by which to pay the initial
 19 partial filing fee."); *Taylor v. Delatoore*, 281 F.3d 844, 850 (9th Cir. 2002) (finding that 28
 20 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's IFP case based
 21 solely on a "failure to pay ... due to the lack of funds available to him when payment is
 22 ordered.").

23 Accordingly, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [Doc. No. 6] and
 24 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further
 25 orders the Secretary of the California Department of Corrections and Rehabilitation ("CDCR")
 26 to garnish the \$350 balance of the filing fees owed in this case, collect and forward them to the
 27 Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
 28 § 1915(b)(1).

1 **II. Sua Sponte Screening per 28 U.S.C. §§ 1915(e) and 1915A**

2 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 3 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused
 4 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 5 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
 6 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 7 provisions, the Court must sua sponte dismiss complaints, or any portions thereof, which are
 8 frivolous, malicious, fail to state a claim, or which seek damages from defendants who are
 9 immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27
 10 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)
 11 (§ 1915A); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
 12 § 1915A). “[W]hen determining whether a complaint states a claim, a court must accept as true
 13 all allegations of material fact and must construe those facts in the light most favorable to the
 14 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 15 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

16 Here, the Court finds that Plaintiff’s Eighth Amendment inadequate dental care claims
 17 survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and that
 18 Plaintiff is therefore entitled to U.S. Marshal service on his behalf. *See Lopez*, 203 F.3d at 1126-
 19 27; 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all process, and
 20 perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(2) (providing that “service be effected by
 21 a United States marshal, deputy United States marshal, or other officer specially appointed by
 22 the court ... when the plaintiff is authorized to proceed *in forma pauperis* pursuant to 28 U.S.C.
 23 § 1915.”). Plaintiff is cautioned, however, that “the sua sponte screening and dismissal
 24 procedure is cumulative of, and not a substitute for, any subsequent Rule 12(b)(6) motion that
 25 [a defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal.
 26 2007).

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1 **III. Conclusion and Order**

2 Good cause appearing, **IT IS HEREBY ORDERED** that:

3 1. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 6]
4 is **GRANTED**.

5 2. The Secretary of California Department of Corrections and Rehabilitation, or his
6 designee, is ordered to collect from Plaintiff's prison trust account the \$350 balance of the filing
7 fee owed in this case by collecting monthly payments from the trust account in an amount equal
8 to twenty percent (20%) of the preceding month's income credited to the account and forward
9 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
10 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY
11 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

12 3. The Clerk of the Court is directed to serve a copy of this order on James Tilton,
13 Secretary, California Department of Corrections and Rehabilitation, P.O. Box 942883,
14 Sacramento, California 94283-0001.

15 **IT IS FURTHER ORDERED** that:


16 4. The Clerk shall issue a summons upon Defendants JAMES TILTON, VICTOR
17 M. ALMAGER, CANDIE COOK and Dr. CUMMINGS, and forward it to Plaintiff along with
18 a blank U.S. Marshal Form 285 for each of these Defendants. In addition, the Clerk shall
19 provide Plaintiff with a certified copy of this Order, and certified copies of his Complaint and
20 the summons for purposes of serving each of these Defendants. Upon receipt of this "IFP
21 Package," Plaintiff is directed to complete the Form 285s as completely and accurately as
22 possible, and to return them to the United States Marshal according to the instructions provided
23 by the Clerk in the letter accompanying his IFP package.² Thereafter, the U.S. Marshal shall
24 serve a copy of the Complaint and summons upon each Defendant as directed by Plaintiff on
25 each Form 285. All costs of service shall be advanced by the United States. *See* 28 U.S.C.
26 § 1915(d); FED.R.CIV.P. 4(c)(2).

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28 ² Plaintiff is advised to include the *street address* of the prison where he believes the Defendant
may be found on each U.S. Marshal Form 285.

1 5. Defendants are thereafter **ORDERED** to reply to the Complaint within the time
2 provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42 U.S.C.
3 § 1997e(g)(2) (while Defendants may occasionally be permitted to “waive the right to reply to
4 any action brought by a prisoner confined in any jail, prison, or other correctional facility under
5 section 1983,” once the Court has conducted its sua sponte screening pursuant to 28 U.S.C.
6 § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based on the face
7 on the pleading alone that Plaintiff has a “reasonable opportunity to prevail on the merits,”
8 Defendants are required to respond).

9 6. Plaintiff shall serve upon Defendants or, if appearance has been entered by
10 counsel, upon Defendants’ counsel, a copy of every further pleading or other document
11 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
12 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
13 of any document was served on Defendants, or counsel for Defendants, and the date of service.
14 Any paper received by the Court which has not been filed with the Clerk or which fails to
15 include a Certificate of Service will be disregarded.

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19 **DATED: January 18, 2008**

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21 **IRMA E. GONZALEZ, Chief Judge**
22 **United States District Court**
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